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## **CITIZEN PARTICIPATION AND THE LISBON TREATY: A LEGAL PERSPECTIVE**

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*Abstract*

How to bring the [European] Union closer to its citizens is a problem of European integration. Article 11 of the Lisbon Treaty, is meant to be part of the solution. However, it relies heavily on civil society organisations, which formalizes participatory practices that have been in existence for years without clear effects on citizen participation;. Even its most innovative element – the European citizens’ initiative (ECI) – does not bring significant changes to the Union’s constitutional arrangements. Moreover, secondary legislation places significant hurdles on the submission of ECIs. Yet its introduction might provide impetus to rethink participatory practices, such as horizontal civil dialogue. Moreover, the effects of “popular input” in the form of ECIs on EU institutional dynamics is as yet unknown – and the European Parliament appears to regard it as a political asset. Conceivably, if the ECI proved inadequate, article 11 might constitute a constitutional experiment on the way to meaningful forms of direct democracy at EU level.

**Keywords:** European Union; citizens; participatory democracy; civil dialogue; European citizens’ initiative; direct democracy; Treaty of Lisbon

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<sup>a</sup> This paper draws on a previous article written by Professor Roland Bieber and myself (R. BIEBER/F. MAIANI, Bringing the Union closer to its citizens? “Participatory democracy” and the Potential Contributions of the Lisbon Treaty, *Annuaire suisse de droit européen* 2009/10, p. 229). While I gratefully acknowledge Professor Bieber for his invaluable intellectual input, the responsibility for the views expressed and for any errors is mine alone.

*“Raising public awareness about the EU and involving citizens in its activities is still one of the greatest challenges facing the EU institutions today”* EU web page “Europe in 12 lessons – a citizens’ Europe”

## I. INTRODUCTION

The Treaty of Lisbon<sup>1</sup> has introduced a set of new “provisions on democratic principles” (Title II of the Treaty on the European Union, hereafter TEU). Some of these have an essentially pedagogical purpose. Article 10 (1)-(2) TEU is a case in point. By stating that the functioning of the Union is “founded on representative democracy”, and referring to direct and indirect representation in the European Parliament and Council, it underscores decades-old features of the Union’s institutional structure. Others are more innovative and prescriptive. That is the case of the provisions on “participatory democracy”.<sup>2</sup> Article 10 (3) TEU affirms the right of every citizen to “participate in the democratic life of the Union”. Article 11 TEU then enumerates four distinct channels for participation:

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. [...]

It has been claimed that article 11 is “a milestone on the road to a people’s Europe that is real and feasible”.<sup>3</sup> In this paper, I take this claim seriously and ask whether article 11 can actually assist in “bringing the Union closer to its citizens”.

This, it should be noted, is not the same as asking whether article 11 has the potential to “enhanc[e] the [...] democratic legitimacy of the Union”.<sup>4</sup> The expression “bringing the Union closer to its citizens” was coined by the European Council in the midst of the Maastricht Treaty ratification crisis of 1992<sup>5</sup> – i.e. of a crisis that signalled, for the first time, “a deep sense of malaise and public disaffection with the European construct”.<sup>6</sup> It does not relate to the whole debate on the Union’s “democratic deficit”, but to a more specific problem – a widely perceived lack of social legitimacy.

This is a vital and persistent challenge for the European project. Indeed, since 1992 the malaise has intensified.<sup>7</sup> Not surprisingly the “closer-to-citizens” formula has been repeated in each and every blueprint for Treaty reform – most emphatically in the 2001 Laeken declaration, whose overarching concern was indeed to bring the Union “closer to its citizens” at a “defining moment of its existence”.<sup>8</sup>

Can article 11 TEU help in reversing a trend of citizen indifference, disaffection, even hostility to the European project? While I hope that my observations will bring a contribution to the debate, I make no claim at providing a conclusive or a complete answer in this paper.

To begin with, article 11 TEU itself is only a starting point for institutional reform. In the words of the Economic and Social Committee, it “create[s] a framework, [that] needs to be defined, fleshed out and put into practice with appropriate legal arrangements”.<sup>9</sup> At the present stage, therefore, one can only make a provisional assessment of the potentialities of article 11 in light of past practice, of the provision’s own terms, and of the (so far) limited steps that have been taken in its implementation. This is what I will attempt to do in sections 3 to 5 – dealing respectively with article 11 as a whole, with civil dialogue, and with the European citizens’ initiative. Before that, I will examine in section 2 the relationship between the “closer-to-citizens” discourse, the concept of “participatory democracy” as enshrined in article 11, and citizen participation.

A second limitation flows from my own disciplinary background. Gauging the potential of article 11 TEU for citizen mobilization involves questions of political science, of sociology and – perhaps less prominently – of law. I do not claim to have produced such a multidisciplinary

reflection. This paper is no more and no less than a lawyer's attempt to engage in debate with the members of the other relevant disciplines.

## II. BRINGING THE UNION "CLOSER TO ITS CITIZENS", "PARTICIPATORY DEMOCRACY" AND CITIZEN PARTICIPATION

The expression "bringing the Union closer to its citizens" – a rhetorical cliché, further trivialized by repetition – is devoid of a definite meaning, because it says nothing about the kind and degree of proximity that should be attained between the Union and its citizens. And in fact, while the expression itself has remained unaltered for approximately twenty years, its meaning has expanded to cover different conceptions of the Union-citizen relationship, and it has provided a normative justification for a whole array of reform agendas.

◆ In official discourse – long before 1992 – "closeness-to-citizens" has been seen first of all as a function of the Union's ability to meet the citizens' needs and expectations.<sup>10</sup> The Union is "close" to its citizens by bestowing on them legal rights and freedoms, by delivering effective policies and also, at first sight paradoxically, by not meddling in issues that are better left to national processes, traditions and identities<sup>11</sup>. Many reforms introduced in Maastricht and Amsterdam – the subsidiarity principle, the area of freedom, security and justice, European citizenship itself – were explicitly linked to this conception of "closeness", whose latest *avatar* is the need to better "communicate" Europe, its *raison d'être*, its relevance to citizens' daily lives, its achievements.<sup>12</sup>

◆ From Maastricht on, "closeness-to-citizens" has also been associated to making the Union itself more intelligible and transparent to citizens. Hence, bringing the Union closer to its citizens by simplifying its founding Treaties, by clarifying its competences, goals and values, by rationalizing its institutional structure and decision-making processes, by bringing into the open its deliberations and documents – even by giving it symbols and "a face".

◆ All of these themes were prominent in the post-Nice reform process and are accordingly reflected in the Lisbon Treaty.<sup>13</sup> During

the works of the Convention on the future of the Union, however, a new sense of the word “closer” has emerged in the Treaty reform agenda. In presenting a very first draft of what would later become article 11 TEU, the Convention Preasidium explained its purpose as “enabl[ing] the citizens to see that [...] they can contribute to the framing of the Union’s decisions [...]”.<sup>14</sup> This expresses, in embryonic form, the idea that the Union can be brought closer to citizens by engaging them to participate in its activities, and thus gain a sense of ownership of the integration process.

As this short and incomplete summary indicates, citizen participation is just one facet of a broader effort to “close the gap” between the Union and its citizens. It is also, chronologically, the most recent component of the “closer-to-citizens” discourse – a late addition to what Joseph Weiler has styled “benign paternalism” and “brand development”.<sup>15</sup>

It is interesting to note that for all its “closer-to-citizens” rhetoric, the 2001 Laeken declaration did not mention participatory democracy at all. The concept of participatory democracy as reflected in the Constitutional Treaty, and later on in article 11 TEU, rather resonates with the Commission’s reflection on EU governance that culminated in the 2001 White Paper.<sup>16</sup> This affinity is worth stressing, because it allows to dispel a misunderstanding – namely that “participatory democracy” can be equated to citizen participation, or to put it differently that everything in article 11 TEU is relevant to the quest for citizen involvement.

The White Paper concept of “participation” builds on a long-standing practice of special interest group consultations. It does signal a shift away from a corporatist perspective in that it implies an inclusive dialogue with civil society organisations of all descriptions. Its focus remains nonetheless the involvement of organized civil society in an output-maximising logic, and it has – conceptually and practically – little to do with (ordinary) citizen participation.<sup>17</sup> This argument can be directly transposed to article 11 (3) TEU, which mandates the Commission to consult “parties concerned” in keeping with pre-Lisbon practice, and largely replicates pre-existing provisions of primary law.<sup>18</sup>

It can be more broadly transposed – even though this is perhaps less obvious – to those parts of article 11 TEU that concern the dialogue

between the institutions and organized civil society. True, the interaction between EU institutions and organised civil society could be conducive to citizen participation to the extent that, as EU institutions claim, “civil society organisations [...] are [...] intermediaries between Europe and its citizens”.<sup>19</sup> Several studies seem to indicate, however: (a) that the contacts between European-level civil society and lay citizens – or even grassroots organisations – are tenuous at best,<sup>20</sup> and that (b) more in general, years of symbiotic relations between the Commission and organized civil society have brought no demonstrable advantage in the quest for more “proximity” between the Union and its (ordinary) citizens.<sup>21</sup>

### III. OF NEW AND OLD IN ARTICLE 11 TEU

Having clarified what, in article 11, may be considered as relevant to the objective of “bringing the Union closer to its (ordinary) citizens”, we may now ask what is new in it.

Formally speaking, the answer is “everything”: the provisions of article 11 TEU have no counterpart in pre-Lisbon primary law (save for para. 3 on Commission consultations, which we have excluded from our enquiry).

From a substantive point of view, things are less clear-cut. Civil dialogue as foreseen in article 11 (1) and (2) is a pre-Lisbon practice for which article 11 merely provides a new legal framework, more visibility and – one may expect – the impetus for further development. The European citizens’ initiative, by contrast, is in all senses new to EU institutional law.

Still, it is worth pointing out that article 11 – including para. 4 on the citizens’ initiative – remains wedded to a very traditional conception of the Union’s institutional make-up. As was the case before the Lisbon Treaty, outsiders’ participation of any kind remains strictly confined to non-decision areas.<sup>22</sup> The *méthode communautaire*, whereby the Commission has the monopoly of initiative and decision is devolved to Parliament and Council, is left untouched – not to speak about the role of the Member States as “masters of the Treaties”.

To put it differently. The Lisbon Treaty falls considerably short of introducing elements of direct democracy<sup>23</sup> such as EU-wide referenda or

“legislative ballots”.<sup>24</sup> It falls short of combining – *à la suisse* – the consociational traits of the Union’s political system with direct popular participation in decision-making.<sup>25</sup> Its approach is infinitely more conservative or – if one prefers – subtle: a limited investment on citizen participation, entailing no redistribution of constitutional powers, and thus leaving the basic features of the system unaltered.

#### IV. HORIZONTAL AND VERTICAL CIVIL DIALOGUE

Article 11 (1) and (2) TEU respectively require the institutions to “give [by appropriate means] citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action”, and to “maintain an open, transparent and regular dialogue with representative associations and civil society”.

Horizontal civil dialogue, foreseen in paragraph 1, does not imply direct communication between the citizens and the institutions. Its purpose is to promote transnational dialogue among citizens and representative association, whereby the institutions are to play a supporting role e.g. by setting up interactive websites<sup>26</sup> or by providing financial support.<sup>27</sup> All in all, what is foreseen is a direct intervention to stimulate the emergence of a European public sphere – a strategic, if delicate, tool for the promotion of citizen awareness and involvement.

By contrast, vertical civil dialogue, foreseen in paragraph 2, is premised on direct and regular communication between the institutions and “civil society”. It is worth noting that even though institutions remain free to engage in direct dialogue with individual citizens, article 11 (2) does not require this. On the contrary, in the scheme of article 11 (2) the dialogue between the institutions and the citizenry is essentially entrusted to the mediation of civil society organisations. For the reasons offered above, the potential to meaningfully involve lay citizens in this manner appears limited.<sup>28</sup>

Legally speaking, article 11 (1) and (2) introduce an element of obligation (and a legal basis) for participatory practices that were, so far, undertaken on a strictly voluntary basis.<sup>29</sup> The designation of the “institutions” as addressees of these newly introduced obligations is somewhat unfortunate. On the one hand, it has the effect of excluding



some EU bodies that might play a meaningful role in this context – admittedly, a minor problem that can be corrected through voluntary practices;<sup>30</sup> on the other hand, it has the effect of requiring some institutions to engage in discursive activities for which they are ill-suited (e.g. the Court of Justice).<sup>31</sup> This points to the need of clarifying, through appropriate rules and standards, the form of “dialogues” that each institution may be expected to support or to conduct. Implementation rules and standards will also play a crucial role in other respects. Article 11 (1) and (2) do not confer directly enforceable rights upon “citizens”, “representative associations” or “civil society” organisations<sup>32</sup> – neither a right to enter into dialogue, nor a right to receive responses from the institutions for the views or suggestions expressed. They do impose duties on the institutions, but entrust them with the widest discretion concerning, in particular, the selection of eligible participants in civil dialogue, the modalities of support and communication, and the follow-up.

For the time being, little discussion has taken place on how to implement these provisions.<sup>33</sup> Judging from past experiences, it looks like a radical rethinking of current practices, and a significant investment, will be needed if EU-sponsored civil dialogue is to have any impact at all. Two problems stand out in particular:

- ◆ Conceptually, current EU initiatives – particularly in the field of horizontal civil dialogue – are distorted by an ostensible “marketing” finality. Instead of focusing exclusively on the promotion of free and open discussion on European issues, they (also) aim at promoting the EU and its initiatives with the public.<sup>34</sup> This self-serving approach is both incompatible with a genuine commitment to democratic participation and damaging for the Union’s credibility;
- ◆ Practically, a recently published research suggests that EU initiatives simply fail to reach out to wide and representative sections of the population.<sup>35</sup>

## V. THE EUROPEAN CITIZENS’ INITIATIVE

### 5.1. *The Treaty provisions concerning the European citizens’ initiative*

The idea of introducing a “legislative right of initiative for citizens” was first mentioned during the 1996 Intergovernmental Conference.<sup>36</sup>

Introduced in the Constitutional Treaty as a last minute amendment,<sup>37</sup> the European citizens' initiative (hereafter, ECI) has been transposed without further changes in the Lisbon Treaty.

Article 11 (4) TEU delineates three basic features of the ECI:

- ◆ A valid ECI must be supported by “no less than one million citizens who are nationals of a significant number of Member States”;
- ◆ The ECI has the purpose of inviting “the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties”. This wording entails two limitations on the scope of the ECI. On the one hand, “constitutional” initiatives, i.e. initiatives launched to put Treaty change on the agenda, are apparently ruled out.<sup>38</sup> On the other hand, ECIs are ruled out in those areas – limited, but nonetheless significant – where the Commission does not have a right of initiative.<sup>39</sup>
- ◆ The effect of a valid ECI is to “invite” the Commission to submit a proposal. In other words, and by analogy with article 225 TFEU<sup>40</sup>, the ECI is not binding on the Commission, and the latter retains full discretion in deciding whether and how it will adopt a follow-up proposal.

Article 11 (4) TEU is not self-executing. Its implementation requires the adoption of a Regulation fleshing out its stipulations (e.g. the “significant number of Member States” requirement), defining the ECI procedure and laying down if appropriate further conditions. On 16 February 2011, the European Parliament and Council have adopted Regulation 211/2011 (hereafter, the ECI Regulation)<sup>41</sup>. The Regulation shall apply – and it will therefore become possible to submit ECIs – from 1 April 2012.<sup>42</sup>

## *5.2. Potentialities of the European citizens' initiative and legal-institutional conditions to realize them: accessibility, credibility and integrity*

The introduction of the citizens' initiative has the potential to make two distinct contributions in bringing the Union closer to its citizens. Its immediate purpose is to democratize EU decision-making processes by opening them to popular input. In a broader perspective, the ECI might

also be instrumental in promoting the emergence of a European public sphere. As Thorsten Hüller puts it, “active citizenship should develop [...] civic skills and virtues relevant for a working democracy”.<sup>43</sup> The contribution of the ECI in this regard would ideally be to “foster greater cross-border debate about EU policy issues, by bringing citizens from a range of countries together in supporting one specific issue”.<sup>44</sup> Provided that the process is sufficiently iterative and inclusive, citizens might thus be expected to become more acquainted with European themes and, as a side-effect, with the European Union, its powers, and its institutional system.

For these significant benefits to materialize, however, several preconditions must be met. One of these is a legal and institutional framework that satisfies, in a delicate balance, three normative criteria which we may call “accessibility”, “credibility” and “integrity”.<sup>45</sup>

◆ Accessibility. Recital 2 of the ECI Regulation states that “the procedures and conditions required for the citizens’ initiative should be clear, simple, user-friendly and proportionate to the nature of the citizens’ initiative” – a non-binding agenda-setting instrument – “so as to encourage participation by citizens and make the Union more accessible”. Formalities should be kept at a minimum. More generally, the “hurdles” to be overcome in order to submit a valid ECI should be kept as low as possible. One requirement is entirely defined by the Treaty – an ECI must be supported by one million citizens, representing roughly 0,2% of EU citizenry. By drawing comparisons with national rules on popular initiatives that require the support of 1% or more of the population, several commentators have contended that this requirement represents a modest hurdle.<sup>46</sup> This is a very abstract way of reasoning. In practice, presenting a valid ECI will require collecting one million signatures instead of tens of thousands; doing so across a “significant number of Member States” having different languages and cultures; and doing so in the absence of significant precedents, let alone a well-established practice in transnational opinion building. Experience with “test” initiatives launched before the entry into force of the Lisbon Treaty suggests that even fulfilling the basic requirements set by the Treaty is quite difficult in practice.<sup>47</sup>

◆ Credibility. In the first place, this refers to the credibility of the ECI as a genuine expression of Europe-wide concerns. In this sense, it is a competing value with regard to accessibility – the more signatures are required, the higher the “significant” number of Member States, the stronger the credibility of the ECI in this sense. On the other hand, it refers to the credibility of the ECI as a tool of participation in the eye of its users – citizens. The ECI will hardly be used if it is seen as having no impact on the agenda of the EU institutions and on EU legislation. In this respect, it should be stressed again that the ECI suffers from the handicap of being a constitutionally weak instrument – the Treaty leaves the follow-up entirely in the hands of the Commission and of the Union’s decision-making institutions. To make up for this deficit, it is simply not enough for the Commission to say that it will give “serious consideration” to the ECIs submitted to it.<sup>48</sup> To be sure, the Treaty rules out conferring a binding character to ECIs, but minimum follow-up obligations must be established by secondary legislation lest the ECI be seen as simply irrelevant by its potential initiators.<sup>49</sup> Other than by neglect, the credibility of the ECI could be undermined by manipulation. Nothing could be more detrimental to the ECI than the establishment of rules allowing the institutions, and particularly the Commission, to support initiatives that fit its own agenda, and to prevent unwelcome ones from being pursued. This consideration, of course, does not rule out admissibility rules, nor does it rule out the provision of support by the EU to initiators. Yet, it makes any such rules particularly delicate.

◆ Integrity. At a basic level, this refers to the prevention and repression of abuse and fraud by the organisers – misuse of the personal data collected, falsification of signatures, etc. Adequate precautions in these respects must be taken in order to protect EU citizens. Precautions of another kind might be required, so to speak, for the protection of the nascent European public sphere. As noted, the ECI is meant to foster transnational debate so as to make the EU a better working democracy. In this perspective, and by analogy to the “anti-abuse” clauses that are customary in human rights instruments,<sup>50</sup> some form of safeguards need to be instituted in order

to prevent e.g. racist initiatives from receiving publicity and support from the Union. Of course, this is an extremely delicate matter and balance is of the essence. Overly stringent restrictions risk stifling public debate and ruling it out precisely on the sensitive issues that may feature high among citizens' concerns. Worse still, open textured restrictions, leaving a wide margin of discretion to the institutions, would raise the risk of manipulation and undermine, as said, the credibility of the ECI.

In assessing how well the ECI Regulation fares in these respects, I will leave aside a number of potentially important details – e.g. the rules on the collection of signatures and on their “allocation” to the various Member States – and focus instead on three points: (a) the general design of the ECI procedure, and the way it impacts on the accessibility of the ECI as a tool of political initiative and participation; (b) the material admissibility conditions and the safeguards surrounding their application; (c) the follow-up obligations laid down in the Regulation and what they suggest in terms of inter-institutional dynamics.

### *5.3. The ECI process under the Regulation: hurdles and actors*

Article 3 of the Regulation reserves the right of launching an ECI to committees comprising at least seven EU citizens who are residents of at least seven Member States. The right to support a proposed ECI is reserved to EU citizens who are of the age to vote at European elections.

The process leading up to the submission of a valid ECI comprises three phases.

- ◆ First, the committee must register the proposed initiative with the Commission. The Regulation lays down in detail the form of the proposed initiative – which must specify its title, subject-matter, objective and legal basis in the Treaties, and which may, but need not, include a draft legislative proposal – and the information to be provided by the committee members – personal data and information on support and funding. The Commission verifies at this stage that the conditions set out in article 4 of the Regulation are met, including the conditions relating to the content of the proposed ECI (see below, section 5.4).

- ◆ Once the proposed ECI is registered and published on a dedicated website, the committee may start to collect the signatures. As already

recalled, article 11 TEU requires the support of “no less than one million citizens who are nationals of a significant number of Member States”. The Regulation repeats the one-million-signatures requirement, and translates the “significant number” requirement in a requirement to gather a specified minimum of signatures in at least one quarter of the Member States (i.e. seven). Furthermore, it imposes a time limit of twelve months starting from registration for the collection of the signatures.

◆ After collecting the signatures, the committee must submit them to the Member States for verification. Once it is certified that the requisite number of signatures has been collected within the prescribed deadline, the committee can submit the ECI to the Commission.

The ostensible objective of the provisions I have cursorily described is to ensure – simultaneously – that the ECI is an accessible tool of political initiative, that ECIs reflect “Europe-wide” issues, and that they remain “relevant” from registration to submission<sup>51</sup>. These are no doubt legitimate concerns<sup>52</sup>, but the end-result is a legal framework that raises significant hurdles on the way to submitting an ECI.

The rules on the formulation of proposed ECIs raise a first skill (or cost) hurdle. While the Regulation appropriately refrains from requiring the organisers to draw up a draft legislative act, it does require them to indicate “the provisions of the Treaties considered relevant [...] for the proposed action”. This is neither unreasonable nor disproportionate – after all, an ECI must by definition relate to an action that lies within the Commission’s powers of initiative. And yet, decades of inter-institutional litigation have made it clear that determining the proper legal base of EU action can involve intricate legal questions. Of course, the provision of adequate support to would-be initiators would go a long way in solving the problem.<sup>53</sup> Instead of financial support to obtain independent advice, however, article 4 (1) ECI Regulation requires the Commission to establish a “point of contact which provides information and support”. This provision may or may not prove insufficient, but it appears improper in that it places the initiators, so to speak, in the hands of their counterpart in the process – the Commission itself.

Concerning the collection of signatures, the Regulation considerably aggravates the obstacles raised by article 11 TEU itself. As said, collecting one million signatures in a transnational campaign has been empirically demonstrated to be a demanding task. The Regulation lays down a “one quarter Member States” threshold – lower than originally proposed by the Commission, but arguably higher than necessary to ensure that ECIs reflect “EU-wide” concerns<sup>54</sup> – and moreover imposes a twelve months time limit for the collection. In view of the number of signatures to be collected, and of the complexities involved in campaigning a significant number of Member States, a longer deadline could at least have been foreseen. By way of comparison, article 138 and 139 of the Swiss Federal Constitution allow eighteen months for the collection of 100'000 signatures in support of popular initiatives. And it may be observed that even though Switzerland is a multinational State, the political, cultural and linguistic barriers confronting initiators appear to be much lower than in the case of EU transnational campaigns.<sup>55</sup>

While it raises these considerable difficulties, the Regulation not only fails to foresee any form of public support for initiators, but goes so far as to provide in article 4 (1) that “the translation of the proposed citizens’ initiative into other official languages of the Union shall be the responsibility of the organisers”. This provision is both surprising and unfortunate. Surely, “an important innovation in the democratic functioning of the Union” such as the ECI<sup>56</sup> would have justified the investment of providing an official translation in all the languages of the Union – and perhaps the solemnity of a publication in the Official Journal.<sup>57</sup>

In leaving the translation to the organisers, the Regulation raises an unnecessary hurdle, contradicts the objective of having true Europe-wide ECI campaigns, and furthermore entails the risk that the process be vitiated by incompetent translations.<sup>58</sup>

All in all, launching and submitting a valid ECI under the Regulation appears to be an extremely demanding endeavour – one that looks like being *de facto* reserved to well-financed and well-organised interest groups and organisations. It would have been perhaps naïve to think that the ECI could be an instrument of political initiative at the disposal of ordinary citizens. The ECI Regulation shelves such fancies for good.

#### *5.4. The permissible content of an ECI: substantive criteria, Commission discretion and judicial review*

The ECI Regulation places a number of limits on the permissible content of a citizens' initiative, and entrusts the Commission with the task to enforce them already at the stage of registration. According to article 4 (2) ECI Regulation, the Commission must register within two months the proposed initiatives it receives, provided that the formal conditions are fulfilled and provided that

- b) the proposed citizens' initiative does not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties;
- c) the proposed citizens' initiative is not manifestly abusive, frivolous or vexatious; and
- d) the proposed citizens' initiative is not manifestly contrary to the values of the Union as set out in Article 2 TEU.

The first criterion is taken from article 11 TEU. The second and third have been added by the legislator and respond to legitimate preoccupations – avoiding abuse of the ECI, and more particularly preventing the ECI from becoming the instrument of hate-speech campaigns.

The key issue, as already noted, is whether these criteria place the Commission in a position to “pilot” the ECI process according to its own preferences and agenda. The sheer complexity of the legal base criterion (lit. b) and the vagueness of the two other criteria (lit. c and d) might suggest that this is indeed the case. At the same time, the ECI Regulation includes two important safeguards. On the one hand, by using the term “manifestly”, article 4 (2) makes it clear that the Commission enjoys limited discretion and may only refuse registration in clear-cut cases. On the other hand, the Commission will act under the control of the European Court of Justice and Ombudsman, as implied by article 4 (3) of the Regulation. The Court may be expected to apply a rigorous standard of review given that as said the Commission enjoys limited discretion, and given that litigation will revolve exclusively around questions of law.<sup>59</sup>

To conclude on this point: on its face, article 4 of the ECI Regulation does not entail a risk of manipulation on the part of the Commission. To



the contrary, it seems to imply that ECIs which are “dubious” on one point or another, e.g. the competence of the Union to act or respect for human rights, should nonetheless be registered and publicly debated. This, it is submitted, is an entirely positive aspect of the Regulation. To begin with, the fact that “dubious” initiatives may be submitted does not in any way imply that the EU will be required – or justified – in taking “dubious” action. In keeping with the nature of the citizens’ initiative, it will be the responsibility of the Commission and of the law-making bodies of the Union to reject or correct the problematic aspects of valid ECIs. As a second point, and making allowance for the filtering out of blatantly “unconstitutional” or discriminatory initiatives, Commission control on the content and direction of proposed initiatives would be both normatively unjustifiable and stifling for public debate – to the extent of defeating the very purpose of the ECI.

#### *5.5. The follow-up of a valid ECI and inter-institutional interplay*

Articles 10 and 11 of the ECI Regulation organise the institutional follow-up of a valid initiative. Article 10 requires the Commission to

- ◆ publish the citizens’ initiative on a web-based register,
- ◆ receive the organisers at an appropriate level for an exchange of views, and
- ◆ adopt within three months a communication, to be both published and notified to the organisers and law-making bodies of the Union, setting out “its legal and political conclusions on the citizens’ initiative, the action it intends to take, if any, and the reasons for taking or not taking that action”.

By laying down the obligation to take a position within a fixed deadline, this provision averts the risk of ECIs being simply received and shelved.<sup>60</sup> At the same time, the Commission is not required to table a proposal within three months. This appears justified, since such a strict deadline would prevent the Commission from complying with its obligations relating to stakeholders’ consultations and impact assessment.<sup>61</sup> At the same time, this recreates the risk – at a later point in time – that valid but uncomfortable ECIs be tacitly shelved by the Commission.

Article 11, which has been introduced at the initiative of the European Parliament, aims to counterbalance this risk. It makes it

mandatory to organise a public hearing, to be held at the European Parliament within the three-month deadline, where the organisers may present the initiative in the presence of MEPs, of a Commission representative at an “appropriate level” and of “such other institutions and bodies of the Union as may wish to participate”.

This provision is intended to raise the political profile of validly submitted ECIs and, more importantly, to extract them from a purely bilateral relationship between the initiators and the Commission. Its chief merit is that of (politically) reinforcing what would otherwise be a (legally) weak agenda-setting instrument. Indeed, involving other institutions and bodies – and especially the EP – may “bring political pressure to bear on the Commission to give a positive reply to the citizens’ requests”.<sup>62</sup>

Quite apart from this, article 11 of the ECI Regulation reflects the wish of the European Parliament to be directly involved in the ECI process – a wish that other bodies, including the Economic and Social Committee and the Committee of the Regions, have also clearly expressed.<sup>63</sup> This suggests that for all its legal shortcomings, several EU bodies and institutions regard the ECI as a potentially valuable political asset – as the case may be, as a means to pursue their own policy agendas or as a means to raise their profile *vis-à-vis* the other institutional actors. Thus, it is true as I have said that the ECI is a modest innovation that leaves the EU institutional system unchanged in its core features. And yet, to judge from the keen interest it is already arousing, it might nonetheless induce some changes in inter-institutional balances and interplay.

## VI. CONCLUSIONS

As noted in the introduction, the Economic and Social Committee has hailed article 11 TEU as a “milestone on the road to a people’s Europe that is real and feasible”.<sup>64</sup> Opinions in the literature have been more reserved,<sup>65</sup> and justifiably so.

To begin with, article 11 is something of a mixed bag. It brings under the same umbrella participatory practices that respond to different logics and that in many cases have little to do with citizen involvement. Stakeholders’ consultations, which are prevalently seen as pertaining to the “output” legitimacy logic of maximising the quality and effectiveness of EU

decisions, are a case in point.<sup>66</sup> More generally, article 11 relies to a large extent on the involvement of civil society organisations to achieve broader participation. Unfortunately, the assumption that the civil society organisations involved in European affairs can function as effective “mediators” between the institutions and the citizenry at large appears to be rather shaky. Finally, one cannot but observe that three out of four of the participatory practices listed in article 11 have been in existence for several years without producing appreciable results in terms of “bringing the citizens closer to the European Union”. Indeed, the ratification crisis of the Constitutional Treaty and the disappointingly low turnout at the latest European elections – events that have been widely perceived as further evidence of the Union’s legitimacy crisis<sup>67</sup> – have taken place at a moment when participatory engineering and civil society involvement were already in full swing.

This is not to say that article 11 TEU holds no promise at all for citizen participation. But surely, for it to have an appreciable impact, it will at the very least require a substantial investment and a committed implementation.

For example, promoting horizontal civil dialogue can be seen as a long-term investment in the most strategic asset for the democratic life of the Union – the emergence of a European public sphere. For the investment to be credible and effective, however, misguided attempts at communicating Europe’s virtues should be set aside in favour of a commitment to free debate on “all areas of Union actions”.

As for the European citizens’ initiative, it is certainly the most promising innovation of article 11 TEU,<sup>68</sup> but it also epitomizes the lack of courage of the authors of the Treaty, who refrained from introducing genuine tools of direct democracy in favour of a sort of improved *status quo*. It is difficult to say at this stage whether the ECI will be condemned to irrelevance, or whether it will trigger new dynamics. The implementing rules adopted by Parliament and Council have raised considerable hurdles on the way to submitting a valid ECI. This appears to exclude *de facto* ordinary citizens from taking the political initiative of launching ECIs, and might prevent more generally the ECI from becoming standard democratic practice – or at least delay its impact. On the other hand, the Regulation includes a well-balanced system of preventive

control on the content of proposed ECIs as well as follow-up obligations that might make up in part for the weak legal status of ECIs – and as a side-effect, trigger interesting inter-institutional dynamics.

One last observation is perhaps appropriate on the (unintended) salience of article 11 for the Union's quest for proximity with the citizens. For all its legal weakness, article 11 raises the stakes of the Union's democratic challenge. Its very inclusion in the Treaty symbolises a renewed commitment of the Union to democracy, and to the ambitious objective of involving the citizens in a sustained and meaningful way.<sup>69</sup>

Failure to achieve appreciable results might render article 11 TEU counterproductive – a confirmation of the “distant Brussels” cliché. The institutions might therefore be pressured to exploit its potentialities to their full – and beyond its legal significance. Or – if article 11 does fail eventually, and the Union's legitimacy crisis persists – this might at long last convince the authors of the Treaties to go beyond the “carefully controlled experiment” of the ECI and to introduce meaningful forms of direct democracy at EU level<sup>70</sup>.

## ENDNOTES

<sup>1</sup> OJ 2007 C 306/1.

<sup>2</sup> This was the title of article I-47 of the Treaty establishing a Constitution for Europe (OJ 2004 C 310/1). In new article 11 TEU, the title has been dropped but the substance of the provision has been entirely preserved.

<sup>3</sup> Economic and Social Committee, Opinion on the implementation of the Lisbon Treaty: participatory democracy and the citizens' initiative (OJ 2010 C 354/59), para. 5.1.

<sup>4</sup> Lisbon Treaty, preamble, recital 1.

<sup>5</sup> European Council, 16 October 1992, Birmingham declaration – A Community close to its citizens (EEC Bulletin 10-1992), § I.8.

<sup>6</sup> J.H.H. WEILER, To be a European Citizen: Eros and Civilization, in: J.H.H. WEILER, The Constitution of Europe, 1999, p. 324, at p. 329.

<sup>7</sup> As evidenced by ratification crises, decreasing turnout at European elections, declining trust in the EU, and the rise of euro-sceptic parties and opinion in several member States.

<sup>8</sup> European Council, 15 December 2001, Laeken Declaration on the future of the European Union (EU Bulletin 12-2001), § I.27 ff. See also e.g. Declaration n° 23 annexed to the Treaty of Nice (OJ 2001 C 80/85).

<sup>9</sup> Economic and Social Committee (note 4), para. 3.4.

<sup>10</sup> See e.g. the second Report of the Adonnino Committee on a People's Europe (EEC Bulletin 3-1985), p. 111; see also, for a later and more explicit example, the Westendorp Report of 5 December 1995, para. I.

<sup>11</sup> See the preamble of the TEU, evoking "an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity".

<sup>12</sup> See e.g. the Commission Communication "Plan D for Democracy, Dialogue and Debate", COM (2005) 494, at p. 3: "People need to feel that Europe provides an added value".

<sup>13</sup> For an overview, see S.C. SIEBERSON, *The Treaty of Lisbon and its impact on the Union's democratic deficit*, *Columbia Journal of European Law* (2008), p. 445.

<sup>14</sup> See Praesidium doc. CONV 650/03 on the democratic life of the Union.

<sup>15</sup> J.H.H. WEILER, *The Union belongs to its citizens: three immodest proposals*, *European Law Review* (1997), p. 150, at p. 152; J.H.H. WEILER (note 7), at p. 333.

<sup>16</sup> COM (2001) 428.

<sup>17</sup> See P. MAGNETTE, *European Governance and civic participation: beyond elitist citizenship?*, *Political Studies* (2003), p. 1, esp. at p. 5 ff; B. KOHLER-KOCH, *Does participatory governance hold its promises?*, in: B. KOHLER-KOCH/F. LARAT (eds.), *Efficient and democratic governance in the European Union*, 2008, p. 266, at p. 270.

<sup>18</sup> See point 9 of the 1997 Protocol on the application of the principles of subsidiarity and proportionality, now article 2 of the 2007 Protocol of the same name.

<sup>19</sup> See Decision 1904/2006 establishing for the period 2007 to 2013 the programme "Europe for Citizens" to promote active European citizenship (OJ 2006 L 378/32), recital 12.

<sup>20</sup> B. KOHLER-KOCH, (note 18), at p. 285 f; S. SAURUGGER, *Interest groups and democracy in the European Union*, *West European Politics* (2008), p. 1274, at p. 1275.

<sup>21</sup> *Adde* J. GREENWOOD, *Organized civil society and democratic legitimacy in the European Union*, *British Journal of Political Science* (2007), p. 333, at p. 342 ff and 347 ff.

<sup>22</sup> P. MAGNETTE (note 18), at p. 6.

<sup>23</sup> The term "direct democracy" is nonetheless used by some authors, in my view misleadingly. See e.g. EDITORIAL, *Direct democracy and the European Union... is that a threat or a promise?*, *Common Market Law Review* (2008), p. 929.

<sup>24</sup> On EU referenda, see e.g. I. PERNICE, *Referendum sur la Constitution pour l'Europe: conditions risques implications*, in: C. KADDOUS/A. AUER (eds.), *Les principes fondamentaux de la Constitution européenne*, 2006, p. 301; on the "legislative ballot", see J.H.H. WEILER (note 17), at p. 152 f.

<sup>25</sup> For a suggestion in this sense, see A. PETERS, *A plea for a European semi-parliamentary and semi-consociational democracy*, *European Integration online Papers* (2003), n° 3.

<sup>26</sup> This is what the drafters of the provision had in mind when referring to "appropriate means": see E. BERNARD, *La démocratie participative sous l'angle du dialogue civil et du dialogue social*, in: V. CONSTANTINESCO/Y. GAUTIER/V. MICHEL (eds.), *Le Traité établissant une Constitution pour l'Europe*, 2005, p. 365, at p. 368.

<sup>27</sup> See e.g. Decision 1904/2006 (note 20), article 1.

<sup>28</sup> It is true that the Commission makes frequent use of public online consultations, open to all. Their impact on direct citizen involvement appears however to be minimal: see T. HÜLLER, *Playground or democratisation? New participatory procedures at the European Commission*, *Swiss Political Science Review* (2010), p. 77, at p. 98 ff.

<sup>29</sup> E. BERNARD, (note 27), at p. 368.

<sup>30</sup> See Economic and Social Committee (note 4), paras. 4.1.1 and 4.2.4.

<sup>31</sup> V. CUESTA LOPEZ, *The Lisbon Treaty's provisions on democratic principles: a legal framework for participatory democracy*, *European Public Law* (2010=), p. 123, at p. 132.

<sup>32</sup> *Ibidem*, p. 130 f.

<sup>33</sup> See in particular European Parliament, *Developing civil dialogue under the Treaty of Lisbon* (OJ 2010 C 46 E/23).

<sup>34</sup> See in particular Decision 1904/2006 (note 20), article 2, mentioning as an objective of the "Europe for citizens" programme the following: "bringing Europe closer to its citizens by promoting Europe's [...] achievements". See also B. KOHLER-KOCH, (note 18), at p. 272.

<sup>35</sup> T. HÜLLER, (note 29), at p. 92 ff.

<sup>36</sup> See R. KOSLOWSKI, *EU citizenship: implications for identity and legitimacy*, in T. BANCHOFF/M. SMITH (eds), *Legitimacy and the European Union: the contested polity*, 1999, p. 159, at p. 169.

<sup>37</sup> LAMASSOURE, *Histoire secrète de la Convention européenne*, 2004, p. 423 ff.

<sup>38</sup> See e.g. A. AUER, *European citizens' initiative*, *European Constitutional Law Review* (2005), p. 79, at p. 82; S. LAURENT, *Le droit d'initiative citoyenne*, *Revue du Marché Commun et de l'Union européenne* (2006), p. 221, at p. 223. One could argue that the Commission has indeed the power to submit proposals for the amendment of the Treaties (see article 48 (2) TEU). However, it takes more than a bit of semantic stretching to include Treaty amendments in the category of "legal acts of the Union [...]"

implementing the Treaties”.

<sup>39</sup> See e.g. article 30 TEU (Common Foreign and Security Policy) and article 223 TFEU (electoral procedure and statute of MEPs); A. AUER (note 39), at p. 82. The “oneseat” initiative provides an excellent example of the limitations entailed by the wording of article 11 TEU: see B. DE WITTE et al., *Legislating after Lisbon – New opportunities for the European Parliament*, EUI EUDO 2010, p. 9.

<sup>40</sup> Under article 225 TFEU, the European Parliament may invite the Commission to submit a proposal.

<sup>41</sup> OJ 2011 L 65/1.

<sup>42</sup> ECI Regulation, article 23.

<sup>43</sup> T. HÜLLER (note 29), at p. 83.

<sup>44</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on the citizens’ initiative, COM (2010) 119, p. 2.

<sup>45</sup> Other preconditions for a successful implementation of ECIs, that lie beyond the powers of EU institutions and that might be progressively fulfilled as the ECI becomes standard democratic practice, are a demand for participation from the citizenry, and adequate media coverage: see *mutatis mutandis* T. HÜLLER (note 29), at p. 96.

<sup>46</sup> See A. AUER (note 39), at p. 81; European Commission, Green Paper on a European citizens’ initiative, COM (2009) 622, p. 6.

<sup>47</sup> See C. BERG et al. (eds.), *The Initiative for Europe Handbook 2008*, The Initiative & Referendum Institute Europe 2008.

<sup>48</sup> European Commission (note 45), p. 2.

<sup>49</sup> See A. AUER (note 39), at p. 83.

<sup>50</sup> See e.g. article 54 of the EU Charter of Fundamental Rights, article 17 of the European Convention on Human Rights, and article 5(1) of the International Covenant on Civil and Political Rights.

<sup>51</sup> ECI Regulation, recitals 2, 5, 6 and 17.

<sup>52</sup> Even though imposing strong “entry” restrictions in order to ensure that ECIs have a “truly European flavour” is arguably at odds with the nature of the instrument, since it will be up to the Commission to check whether the proposed action would serve the interests of the Union as a whole (see article 17 TEU).

<sup>53</sup> See Economic and Social Committee, (note 4), paras. 4.4.4 and 4.13.2.

<sup>54</sup> For an interesting discussion of the “EU-wide-interest” issue, see B. DE WITTE et al. (note 40), p. 14 f.

<sup>55</sup> See also Economic and Social Committee, (note 4), para. 4.11.1.

<sup>56</sup> European Commission (note 45), p. 2.

<sup>57</sup> See, by analogy, article 69 of the Swiss *Loi fédérale sur les droits politiques* (Classified Compilation of Federal Legislation 161.1).

<sup>58</sup> See B. DE WITTE et al. (note 40), at p. 9. The Commission statement to the effect that it will “check that there are no manifest and significant inconsistencies between the original text and the new linguistic versions” (Council doc. 5769/11 ADD 1 REV 1) is a poor substitute for official translation.

<sup>59</sup> On the Court’s standards of review, see P. CRAIG, *Law, Fact and Discretion in the UK, EU and the USA*, available at <chairemadvpo.fr/pdf/seminaires/2007/contribution\_paul\_craig.pdf>.

<sup>60</sup> For a telling illustration of this risk, drawn from Italian practice, see A. VANZETTI, *Non-binding citizen and regional initiatives in Italy from 1948 to 2005*, Democracy International 2006.

<sup>61</sup> See the 2007 Protocol on subsidiarity and proportionality, article 2 and 5.

<sup>62</sup> P. PONZANO, *A million citizens can request European legislation: a sui generis right of initiative*, available at <debate.eudo.eu/cafe/2011/04/13>.

<sup>63</sup> See Economic and Social Committee, *Opinion on the Proposal for a Regulation of the European Parliament and of the Council on the Citizens’ Initiative* (OJ 2011 C 44/182), para. 4.3; Committee of the Regions, *Opinion on the European citizens’ initiative* (OJ 2010 C 267/57), para. 15.

<sup>64</sup> Economic and Social Committee (note 4), para. 5.1.

<sup>65</sup> See in particular E. BERNARD (note 27) and C. DELCOURT, *Brèves réflexions sur le titre consacré aux ‘dispositions relatives aux principes démocratiques’*, *Revue du Marché Commun et de l’Union européenne* (2008), p. 490, at p. 493.

<sup>66</sup> See B. KOHLER-KOCH (note 18), at p. 270.

<sup>67</sup> See e.g. G. DE BURCA, *After the referenda*, *European Law Journal* (2006), p. 6; European Commission, *Plan-D for Democracy, Dialogue and Debate*, COM (2005) 494, at p. 3 and 9.

<sup>68</sup> A. PETERS, *European Democracy after the 2003 Convention*, *Common Market Law Review* (2004), p. 37, at p. 44 f., 68 and 83.

<sup>69</sup> *Ibidem*, at p. 45.

<sup>70</sup> I owe the conceptualization of the ECI as a “carefully controlled experiment” to Professor Richard Rose. On EU-wide referenda, see his and Gabriela Borz’s analysis: R. ROSE/G. BORZ, *Is there a demand for referendums on Europe?*, *Studies in Public Policy* n° 478, 2010.